No. 01 451 SEP 14 2001

**In The**
**SUPREME COURT OF THE UNITED STATES**

October Term, 2000

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HOSPITAL CORPSMAN FIRST CLASS DENNIS S. MCDONALD,
UNITED STATES NAVY,
*Petitioner,*

*v.*

UNITED STATES OF AMERICA,
*Respondent.*

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On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

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# PETITION FOR A WRIT OF CERTIORARI

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September 2001

## QUESTIONS PRESENTED

I. WHETHER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT PROHIBITS TELEPHONE TESTIMONY IN ADVERSARIAL SENTENCING HEARINGS.

II. WHETHER THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT REQUIRES EITHER IN-PERSON TESTIMONY OR ADMISSIBLE HEARSAY EVIDENCE AT ADVERSARIAL CRIMINAL PROCEEDINGS.

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Hospital Corpsman First Class Dennis S. McDonald, United States Navy, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces, 55 M.J. 173 (2001), is reprinted as Appendix A (1a-19a). The opinion of the Navy-Marine Corps Court of Criminal Appeals, 53 M.J. 593 (N-M. Ct. Crim. App. 2000), is reprinted as Appendix B (20a-34a).

## JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on June 20, 2001. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1259(3) (2000).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the Constitution of the United States provides, in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

The Sixth Amendment of the Constitution of the United States provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .

## STATEMENT OF THE CASE

Prior to Petitioner's contested criminal trial, the prosecution notified the parties that its sole sentencing witness would be the victim's father, a service member who was unexpectedly recalled to perform military duties. Rather than a personal appearance, the prosecution requested testimony by telephone, videotaping a deposition, or travelling to the witness' location to receive his testimony. The defense objected. The judge permitted testimony by telephone, citing the difficulties of travelling an estimated one and one-half hours, the time necessary for moving the

situs of the court, and the inconvenience of delaying other witness' testimony. The witness testified on the telephone for approximately twenty minutes as the sole witness in aggravation.

On March 31, 2000, the Navy-Marine Corps Court of Criminal Appeals affirmed the findings and sentence. *United States v. McDonald*, 53 M.J. 593 (N-M. Ct. Crim. App. 2000). The court relied upon several federal circuit court decisions to reach its holding that "the Confrontation Clause does not apply to post-conviction, non-capital, presentence proceedings, and that it does not prohibit telephonic testimony during such proceedings." *Id.* at 598.

The United States Court of Appeals for the Armed Forces (CAAF) affirmed that decision on June 20, 2001. *United States v. McDonald*, 55 M.J. 173 (2001). The court relied upon several federal circuit court decisions and stated "the Sixth Amendment's Confrontation Clause does not apply to this [*sic*] pre-sentencing portion of a non-capital court-martial." *Id.* at 174. The court held that although the military sentencing scheme is indeed an adversarial proceeding, the Sixth Amendment "does not require an adversarial sentencing hearing with the right of confrontation." *Id.* at 176, 179. It reasoned that the right does not exist because both the president of the United States and Congress have considered the matter and have authorized depositions as an alternative, and neither has prohibited testimony by telephone during sentencing. *Id.* at 174, 177. The court concluded that "[s]ince Congress would not be disabled from changing the sentencing procedures in the military, it is only logical to conclude that the Sixth Amendment right of confrontation does not apply to the presentencing portion of a non-capital court-martial." *Id.* at 177.

The court also examined whether testimony by telephone comports with the Due Process Clause of the Fifth

Amendment, referencing this Court's precedent in *Williams v. New York*, 337 U.S. 241 (1949). *McDonald*, 55 M.J. at 177-78. The court did not find a violation because the procedure met minimum standards of reliability, including notice, the right to counsel, and the right to cross-examination. *Id.*

The court did not address *Middendorf v. Henry*, 425 U.S. 25 (1976), in which this Court clarified "criminal prosecutions" within the context of the Sixth Amendment right to counsel, and set forth the appropriate standard to apply when the Due Process Clause is challenged in the military context.

## REASONS FOR GRANTING THE PETITION

The CAAF made the sweeping pronouncement that service members do not enjoy the protection of the Sixth Amendment's Confrontation Clause in court-martial sentencing hearings, and that the Fifth Amendment's Due Process Clause is fulfilled when witnesses testify by telephone at such hearings. This decision will lead to a departure from the accepted and usual course of judicial proceedings in the military and undermines the reliability of evidence presented in military criminal prosecutions. This decision is contrary to the Constitution of the United States, conflicts with the decisions of this Court, and misconstrues presidential and congressional mandates.

### A. The United States Court of Appeals for the Armed Forces ignored the precedent of this Court and effected sweeping changes in the conduct of court-martial sentencing hearings.

The Sixth Amendment applies "in all criminal prosecutions." U.S. Const. amend. VI. However, the CAAF

ignored the plain language of the Constitution and this Court's precedent to hold that service members do not enjoy the protections of the Sixth Amendment during adversarial sentencing hearings.

In *Specht v. Patterson*, 386 U.S. 605 (1967), this Court held that the right of confrontation applies to adversarial sentencing proceedings. The sentencing scheme in question was

> a separate criminal proceeding which may be invoked after conviction of one of the specified crimes. . . . A defendant in such a proceeding is entitled to the full panoply of the relevant protections which due process guarantees in state criminal proceedings . . . including the right to confront and cross-examine the witnesses against him.

386 U.S. at 607.

A "criminal prosecution" or "criminal proceeding" is any adversarial proceeding in which

> the State is represented by a prosecutor; formal rules of evidence are in force; a defendant enjoys a number of procedural rights which may be lost if not timely raised; and, in a jury trial, a defendant must make a presentation understandable to untrained jurors. In short, a criminal trial under our system is an adversary proceeding with its own unique characteristics.

*Middendorf v. Henry*, 425 U.S. 25, 35 (1976) (citation omitted).

In *Middendorf*, "criminal prosecution" was explored in the context of the Sixth Amendment right to counsel in the military.[1] The military sentencing hearing satisfies the

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[1]This Court held that the military summary court-martial was not a "criminal prosecution" within the meaning of the Sixth Amendment, due

*Middendorf* factors precisely: (1) the prosecutor represents the government; (2) formal rules of evidence apply unless relaxed at the accused's request;[2] (3) the accused enjoys procedural rights which can be waived or forfeited;[3] and (4) advocates attempt to influence an impartial, sometimes untrained, tribunal by establishing facts about the accused or facts relating to the offense or offenses of which he was convicted, and then arguing to either maximize or minimize the punishment imposed.[4]

The right of confrontation applies in the proceedings described in *Middendorf* and *Specht*, such as the military sentencing hearing. Although the CAAF recognized, without examining *Middendorf*, that the military sentencing scheme is adversarial, it held that service members do not enjoy the right to confront adverse witnesses.

The CAAF erroneously followed federal cases that examined *non-adversarial* sentencing hearings in which evidence was presented by *neutral and detached parties* in the form of presentence reports, as required by the U.S. Sentencing Guidelines. The court did not address the important distinction that military sentencing hearings are exempt from the U.S. Sentencing Guidelines. 18 U.S.C. § 3551(a) (2000). This Court's guidance in *Specht* and *Middendorf* controls the issue.

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to the nature of the proceedings, the offenses tried, and the authorized punishments. 425 U.S. at 34, 42. Although the case concerned the Sixth Amendment right to counsel, there is no reason to treat the "face-to-face component" of the Sixth Amendment differently from the rest of the Sixth Amendment guarantees. *Maryland v. Craig*, 497 U.S. 836, 850 (1990).

[2]Rule for Courts-Martial (R.C.M.) 1001(c)(3), Manual for Courts-Martial, United States (MCM) (2000 ed.). In this case, the rules of evidence were not relaxed.

[3]*See* R.C.M. 1001(b)(1)-(2), MCM.

[4]R.C.M. 1001(g), MCM.

**B. The United States Court of Appeals for the Armed Forces misconstrued presidential and congressional mandates that service members enjoy the panoply of Sixth Amendment rights in all phases of courts-martial, including sentencing hearings.**

The CAAF also addressed whether the Due Process Clause of the Fifth Amendment requires the Sixth Amendment right of confrontation in court-martial sentencing hearings, and held that testimony by telephone accorded with the Due Process Clause. *McDonald*, 55 M.J. at 177-78.

This Court has stated: "the appropriate standard to apply in these cases is found in *Middendorf*, . . . where [the Court] also faced a due process challenge to a facet of the military justice system." *Weiss v. United States*, 510 U.S. 163, 177 (1994). Rather than apply the *Middendorf* balancing test, the CAAF erroneously relied upon *Williams v. New York*, 337 U.S. 241 (1949), and summarily held that telephone testimony meets minimum standards of reliability. 55 M.J. at 177.

Judicial deference is " 'at its apogee' when reviewing congressional decision-making" that balances the constitutional rights of service members against the needs of the military. *Weiss*, 510 U.S. 163, 177 (citing *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981)). In this case, the CAAF erred by holding that because the president and Congress did not address the issue, they intended that the Sixth Amendment right of confrontation not apply to adversarial court-martial sentencing hearings. However, the president and Congress have addressed the issue.

Congress has the discretion to create a military criminal law system, and the president of the United States promulgates the rules of court-martial proceedings. U.S.

Const. art. I, § 8; Art. 36(a), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 836(a) (2000). Upon a finding of guilty, both the prosecution and defense are provided the opportunity to present matters to aid either the panel of jury members or the military judge in determining an appropriate sentence within limits that the president prescribes for each offense. Art. 56, UCMJ, 10 U.S.C. § 856; *see generally* Rule for Courts-Martial (R.C.M.) 1001, Manual for Courts-Martial (MCM) (2000). The rules of evidence apply in military sentencing hearings; however, they may be relaxed with respect to the admission of matters in extenuation or mitigation. Mil. R. Evid. 1101; R.C.M. 1001(c)(3), MCM. The president and Congress intended that service members would retain all of their Sixth Amendment rights by establishing an adversarial system and requiring adherence to the rules of evidence.

The military sentencing hearing was specifically designed to be adversarial, distinguishing it from other federal sentencing schemes. Therefore, the CAAF's reliance upon cases set in other federal jurisdictions subject to the U.S. Sentencing Guidelines was misplaced. The Constitution, and presidential and congressional action control the issue.

### C. The United States Court of Appeals for the Armed Forces rendered an erroneous decision of exceptional importance to the proper administration of the military justice system.

The CAAF held that "the Sixth Amendment's Confrontation Clause does not apply to this [*sic*] pre-sentencing portion of a non-capital court-martial." *McDonald*, 55 M.J. at 174 (citations omitted). This revolutionary holding will have a significant adverse impact upon the conduct of court-martial sentencing hearings and

robs service members of their constitutional rights as recognized in *Weiss v. United States*, 510 U.S. at 194 (Ginsburg, J., concurring) (stating "men and women in the Armed Forces do not leave constitutional safeguards and judicial protection behind when they enter military service").

Under the CAAF's broad holding in this case, prosecutors may protect witnesses from the rigors of face-to-face confrontation by preventing service members from observing the demeanor of adverse witnesses as they testify. This Court has recognized:

> [i]t is always more difficult to tell a lie about a person "to his face" than "behind is back." In the former context, even if the lie is told, it will often be told less convincingly. The Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier of fact will draw its own conclusions. . . . That face-to-face presence may . . . confound and undo the false accuser, or reveal the child coached by a malevolent adult.

*Coy v. Iowa*, 487 U.S. 1012, 1019-20 (1988).

The CAAF's holding increases the danger of unreliable evidence. The reliability of evidence in the context of an adversarial forum is particularly important in a sentencing scheme in which the sentencing authority, either a military judge or a panel of jury members, may adjudge any sentence within a wide range.

## CONCLUSION

The CAAF rendered a decision of exceptional importance to the proper administration of military justice. The president and Congress specifically designed a sentencing scheme in which service members retain the panoply of Sixth Amendment rights, including the right of

confrontation. The court ignored the plain reading of the statutory scheme and misapplied federal cases to reach the conclusion that the right of face-to-face confrontation does not apply in adversarial sentencing hearings. This directly conflicts with the Constitution of the United States and this Court's precedent, as well as presidential and congressional intent.

This Court should grant the petition.

Respectfully submitted,

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September 2001

# APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES WASHINGTON, D.C. 20442-0001

UNITED STATES, Appellee
v.
Dennis S. McDONALD, Hospital Corpsman First Class
U.S. Navy, Appellant

No. 00-0544
Crim.App. No. 98 2175.

U.S. Court of Appeals for the Armed Forces.
Argued February 6, 2001.
Decided June 20, 2001.

CRAWFORD, C.J., delivered the opinion of the Court, in which GIERKE and BAKER, JJ., joined. SULLIVAN and EFFRON, JJ., each filed an opinion concurring in the result.

For Appellant: *Lieutenant I. L. Paredes*, JAGC, USNR (argued); *Lieutenant Mari-Rae Sopper*, JAGC, USNR.

For Appellee: *Lieutenant Commander Philip Sundel*, JAGC, USNR (argued); *Colonel Marc W. Fisher, Jr.*, USMC (on brief); *Major Mark K. Jamison*, USMC.

Chief Judge CRAWFORD delivered the opinion of the Court.

Pursuant to his pleas, appellant was found guilty of one specification of committing an indecent act upon a child; contrary to his pleas, he was found guilty of forceful sodomy

and another specification of committing an indecent act upon the same child, in violation of Articles 125 and 134, Uniform Code of Military Justice, 10 USC §§ 925 and 934, respectively. The convening authority approved the sentence adjudged by the military judge of a dishonorable discharge, 15 years' confinement (partially suspended), total forfeitures, and reduction to the lowest enlisted grade. The Court of Criminal Appeals affirmed the findings and sentence. 53 MJ 593 (2000). We granted review of the following issue:

> WHETHER THE LOWER COURT ERRED IN HOLDING THAT THE SIXTH AMENDMENT'S CONFRONTATION CLAUSE DOES NOT APPLY TO THE PRESENTENCING PORTION OF A COURT-MARTIAL, CONTRARY TO THIS COURT'S DECISION IN *UNITED STATES V. GEORGE*, 52 MJ 259 (2000).

We hold that the Sixth Amendment's Confrontation Clause does not apply to this presentencing portion of a non-capital court-martial. However, the Fifth Amendment's Due Process Clause does apply there.

## FACTS

Prior to the presentation of evidence, the prosecutor informed the judge that he intended on calling the victim's father, an active-duty Sergeant Major in the Army serving with the Rapid Deployment Force, located at Fort Stewart, Georgia, who had been present in Jacksonville the day before to testify as an aggravation witness at sentencing. It was not until the night of February 16, 1998, that the victim's father was placed on alert to be at the air field at midnight on the night of February 17 to deploy to the Middle East at 6:00 a.m. that morning because of the crisis with Iraq.

The prosecutor proposed moving the trial to Fort Stewart, or taking his testimony by deposition or by telephone. Defense counsel objected that the deposition "would cause undue delay" and the telephone testimony would violate "the Sixth Amendment right to confront" the witness. But the defense offered to stipulate to the testimony. The Government declined to stipulate to the testimony. The judge then proceeded to hear testimony. After the victim testified, the matter came up again.

The judge stated:

> [A]ny attempt to move either all of the court personnel or counsel for each side for a deposition would involve a major part of a work day just in travel time necessary, setup and the actual testimony and, with a deploying unit and a senior NCO, I think that is simply impracticable. As between the two most feasible methods, one favored by each side, telephonic testimony, while it does not accord face-to-face confrontation, but neither does a stipulation, and affords the opportunity for full cross-examination and to explore issues of opportunity that may be suggested by direct examination, it appears to be -- given that neither method will show the witness' visual demeanor, to give a more nearly full rendition of the testimony than a written stipulation can in circumstances where the witness is pretty clearly unavailable and there is no dispute as the underlying facts surrounding the unavailability.

The Government earlier announced it was fully prepared to bear the cost of moving the proceedings or conducting a deposition at the other post and did not assert any reasons other than those mentioned by the judge that

precluded hearing the testimony of the other witnesses the next day. There is nothing in the record indicating why the interests of the other witnesses outweighed the impact on the court-martial of a one-day delay for such proceedings or deposition.

The court below held "that the Confrontation Clause does not apply to post-conviction, non-capital, presentence proceedings," and thus, the Confrontation Clause does not prohibit taking testimony on the telephone. The Court of Criminal Appeals recognized that this Court has not previously addressed this question. 53 MJ at 598.

## DISCUSSION

The federal, state, and military criminal law systems share a number of traditional sentencing goals including rehabilitation, specific deterrence, general deterrence, incapacitation, retribution, and restitution. *See, e.g., United States v. Lania*, 9 MJ 100 (CMA 1980).

There are, however, differences as well as similarities among the military, federal, and state sentencing procedures. *Cf. United States v. Lacy*, 50 MJ 286, 287 (1999). The military justice system also differs because sentencing includes consideration of morale, as well as good order and discipline, together with unique penalties, such as punitive separation, reduction in rank, and forfeiture of pay. The issue in this case requires us to examine Constitutional, Codal, and Manual for Courts-Martial provisions applicable to sentencing in the military.

*Constitution*. The Fifth Amendment provides: "No person shall be ... deprived of life, liberty, or property, without due process of law...." The Sixth Amendment

provides: "[T]he accused shall enjoy the right ... to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor." The latter provisions were codified in Article 46, UCMJ, 10 USC § 846, which provides that the "defense counsel ... shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe."

The Supreme Court has interpreted both the Due Process Clause and the Sixth Amendment right of compulsory process and confrontation in connection with federal sentencing procedures. A fundamental requirement of due process is that individuals subjected to proceedings by the Government are entitled to the safeguards established in the governing statutes and regulations, and that the Government must follow the prescribed procedures, regardless whether they are constitutionally required. *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954). The present case ultimately involves the question whether the procedure comported with due process in terms of compliance with the safeguards established in the applicable Rules for Courts-Martial and Military Rules of Evidence.

In *Williams v. New York*, 337 U.S. 241, 245 (1949), the Court rejected a "broad constitutional challenge" to the "New York procedural policy [that] encourages [the judge] to consider information about the convicted person's past life, health, habits, conduct, and mental and moral propensities in the context of a death sentence." Justice Black, speaking for the Court, noted that

> both before and since the American colonies became a nation, courts in this country and in England

> practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law. Out-of-court affidavits have been used frequently, and of course in the smaller communities sentencing judges naturally have in mind their knowledge of the personalities and backgrounds of convicted offenders.

*Id.* at 246 (footnote omitted).

The judge's task requires consideration of "the fullest information possible concerning the defendant's life and characteristics." *Id.* at 247. The Court acknowledged the need for presentence reports, *id.* at 249, and "recognize[d] that most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination." *Id.* at 250. In light of the need for individualized sentences, the Court could not "say that the due process clause renders a sentence void merely because a judge gets additional out-of-court information." *Id.* at 252.

In *Specht v. Patterson*, 386 U.S. 605 (1967), the Court held that there was a denial of due process when sentence enhancers (such as the defendant is "an habitual offender and mentally ill") were used "(1) without a hearing at which ... [he] may confront and cross-examine adverse witnesses and present evidence of his own by use of compulsory process, if necessary; and (2) on the basis of hearsay evidence to which ... [he was] not allowed access." The Court found the sentence enhancer "radically different" from the *Williams* "situation." Id. at 608. The High Court reaffirmed that position in *McMillan v. Pennsylvania*, 477

U.S. 79, 91-92 (1986), concluding that preponderance of the evidence was an adequate burden of proof to establish a fact that in turn invoked a mandatory minimum sentence.

In summary, the Constitution requires that evidence admitted during sentencing must comport with the utilitarian purpose of the Due Process Clause, *i.e.*, reliability, and procedural-due-process requirements. In contrast to federal civilian sentencing in non-capital cases, sentencing in the military justice system, even in non-capital cases, is adversarial based on the procedure established by Congress and the President. Thus, in addition to looking at the constitutional sources of rights, we must also examine the Code, the Manual, and the Military Rules of Evidence to determine whether greater rights are given to military defendants.

*Statute*. Subchapter VIII of the Uniform Code of Military Justice sets forth the Articles on sentencing. Generally, it gives discretion to the court-martial to determine an appropriate sentence within "such limits as the President may prescribe" for the offense for which the accused has been convicted. Article 56, 10 USC § 856. These rules are set forth in the Manual for Courts-Martial.

*Procedure and Evidence*

*Manual for Courts-Martial*. Article I, § 8, clause 14, gives Congress the discretion to create a military criminal law system, and Article 36(a), UCMJ, 10 USC § 836(a), authorizes the President to promulgate Rules for Courts-Martial for sentencing. RCM 1001-1009, Manual for Courts-Martial, United States (2000 ed.). These rules have evolved over time. Denise K. Vowell, *To Determine an Appropriate Sentence: Sentencing in the Military Justice System*, 114

Mil.L.Rev. 87 (1986). Except when there is a mandatory sentence, the sentence within Presidential or Codal limits is left to the discretion of the sentencing authority. RCM 1001 establishes the order of presentation, form, and general substance of admissible evidence during the sentencing procedures. The Drafters stated that RCM 1001

> allows the presentation of much of the same information to the court-martial as would be contained in a presentence report, but it does so within the protections of an adversarial proceeding ... although they [the rules] may be relaxed for some purposes. *See* subsections (b)(4) and (5), (c)(3), (d), and (e) of this rule.

Drafters' Analysis, Manual, *supra* at A21-69. Under that rule an accused has a limited right to production of witnesses (RCM 1001(e)(1)) and the right to cross-examination of witnesses (RCM 1001(c)(3)). *See* Art. 46, UCMJ, 10 USC § 846. The Military Rules of Evidence are applicable to sentencing, *see* Analysis of RCM 1001, Manual, *supra* at A21-69; thus providing procedural safeguards to ensure the reliability of evidence admitted during sentencing. Mil.R.Evid. 1101, Manual, *supra*. Under Mil.R.Evid. 1101(c), the Rules of Evidence "may be relaxed in sentencing procedures as provided under RCM 1001 and otherwise as provided in this Manual."

RCM 1001(b)(4) relaxes the rules of evidence concerning the prosecution's evidence in aggravation in non-capital cases by providing that "a written or oral deposition taken in accordance with RCM 702 is admissible." RCM 1001(e) governs production of witnesses. RCM 703(c)(2) requires the defense to provide trial counsel with a list of witnesses whose production is requested, including the

reasons why production of the witnesses is necessary under RCM 1001(e). Subsection 1 of that Rule sets out general guidance on the production of witnesses by providing that "[d]uring the presentence proceedings, there shall be much greater latitude than on the merits to receive information by means other than testimony presented through the personal appearance of witnesses." It goes on to state: "Whether a witness shall be produced to testify during presentence proceedings is a matter within the discretion of the military judge, subject to the limitations in subsection (e)(2)."

A "witness may be produced to testify during presentence proceedings through a subpoena or travel orders at Government expense only if" certain criteria are met, including a determination that "[o]ther forms of evidence, *such as* oral depositions, written interrogatories, or former testimony would not be sufficient to meet the needs of the court-martial in the determination of an appropriate sentence." RCM 1001(e)(2) and (D) (emphasis added). A balancing test is applied by the judge who measures whether the "significance of the personal appearance of the witness to the determination of an appropriate sentence, when balanced against the practical difficulties of producing the witness, favors production of the witness." RCM 1001(e)(2)(E). *See also United States v. Combs*, 20 MJ 441 (CMA 1985); *United States v. Loya*, 49 MJ 104 (1998).

In summary, the President has provided rules to ensure "relevant and reliable" evidence. *United States v. Ariail*, 48 MJ 285, 287 (1998). *See also United States v. Prevatte*, 40 MJ 396, 397 n.* (CMA 1994). With respect to the prosecution's evidence in aggravation, the safeguards in the Rules of Evidence apply. *Id.* RCM 1001(e)(2)(D) permits the Rules to be relaxed only to the extent that the testimony is offered in "forms of evidence such as" an oral or written

deposition. This rule does not preclude taking testimony by telephone.

In the present case the testimony at issue was from the victim's father. As he was part of the prosecution's case in aggravation, his testimony was subject to the provisions of RCM 1001(b)(4). *Cf.* RCM 1001(e). The prosecution's offer to take and present the witness' testimony by deposition certainly would have comported with the Rules. The military judge, however, decided to take the testimony by telephone. The defense objected both to the deposition and to the telephone testimony.

Both political branches of Government have considered this matter and have authorized depositions. Neither have prohibited testimony by telephone during sentencing. The military judge, faced with an unusual situation and the likelihood that the testimony would be temporarily lost, had to craft a creative solution to meet the needs of a party or unforeseen military exigency.

Similarly we need not decide whether the President may authorize presentencing testimony in aggravation by means other than the specific examples given in the rules. The relative merits of depositions versus other forms of testimony, including telephone conferencing, are matters to be assessed in the process set forth in Article 36 -- in terms of opportunities for examination, cross-examination, and impact on the deliberations -- which will determine the scope and content of such rules, if any.

We hold that the Court of Criminal Appeals was correct in holding that the Confrontation Clause does not apply. *United States v. George*, 52 MJ 259 (2000), does not compel a different result. The Court in *George* held that

admission of evidence of "future risks" was harmless error under the circumstances. *Id.* at 262. The Court did not decide whether the Sixth Amendment applied to sentencing testimony, because it assumed the error was constitutional in nature in light of George's assertion and the Government's concession that the error was of constitutional magnitude. *Id.* at 261. Unlike *George*, there is no government concession in this case or an unchallenged holding by the court below that there was error. Since Congress would not be disabled from changing the sentencing procedures in the military, it is only logical to conclude that the Sixth Amendment right of confrontation does not apply to the presentencing portion of a non-capital court-martial.

However, under *Williams*, the Due Process Clause requires that the evidence introduced in sentencing meet minimum standards of reliability. Those requirements were met here. There is no evidence to suggest that the victim's father's testimony was unreliable or his identity questioned. Additionally, there was notice to the defense, right to counsel, right of cross-examination, and a presentation of the evidence by telephone to the judge as the sentencing authority. The record establishes that the "practical difficulties of producing a witness," including the cost and timing, were such that the judge did not abuse his discretion in allowing the victim's father's testimony to be taken by telephone. *Cf. United States v. Hill*, 4 MJ 33, 37 n.18 (CMA 1977). *See also United States v. Rich*, 12 MJ 661, 663 n.3 (ACMR 1981). In any event, any error in this case was harmless. We do not suggest that telephone testimony is appropriate in all cases. Manual guidance to the military judge during sentencing is sufficient to ensure the proper balance between obtaining needed testimony and safeguarding rights of the accused.

The decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

FOOTNOTE:

* *See United States v. Morrow*, 177 F.3d 272, 304 (5th Cir. 1999); *United States v. Silverman*, 976 F.2d 1502, 1511 (6th Cir. 1992)(en banc), *cert. denied*, 507 U.S. 990 (1993); *United States v. Wise*, 976 F.2d 393, 401 and n.3 (8th Cir. 1992)(en banc), *cert. denied*, 507 U.S. 989 (1993); *United States v. Helton*, 975 F.2d 430, 434 (7th Cir. 1992); *United States v. Beaulieu*, 893 F.2d 1177, 1180 (10th Cir.), *cert. denied*, 497 U.S. 1038 (1990).

SULLIVAN, Judge (concurring in the result):

This was a trial by military judge alone (Article 16(1)(B), Uniform Code of Military Justice, 10 USC § 316(1)(B)), and appellant's sentence was determined by a judge using the Rules for Courts-Martial promulgated by the President under Article 36(a), UCMJ, 10 USC § 836(a). See RCM 1001-1009, Manual for Courts-Martial, United States (1995 ed). Appellant objected to the admission of sentencing testimony by the victim's father, over the telephone, offered by the prosecution as aggravation evidence.

There is no express provision in the Military Rules of Evidence authorizing the taking of testimony for sentencing by telephone. However, RCM 1001(e)(1) might be broad enough to allow this sentencing procedure.[1] It states:

> (e) *Production of witnesses.*
>
> (1) *In general. During the presentence proceedings, there shall be much greater latitude than on the merits to receive information by means other than testimony presented through the personal appearance of witnesses.* Whether a witness shall be produced to testify during presentence proceedings is a matter

within the discretion of the military judge, subject to the limitations in subsection (e)(2) of this rule.

**Discussion**

See R.C.M. 703 concerning the procedures for production of witnesses.

(2) *Limitations.* A witness may be produced to testify during presentence proceedings through a subpoena or travel orders at Government expense only if—

(A) The testimony expected to be offered by the witness is necessary for consideration of a matter of substantial significance to a determination of an appropriate sentence, including evidence necessary to resolve an alleged inaccuracy or dispute as to a material fact;

(B) The weight or credibility of the testimony is of substantial significance to the determination of an appropriate sentence;

(C) The other party refuses to enter into a stipulation of fact containing the matters to which the witness is expected to testify, except in an extraordinary case when such a stipulation of fact would be an insufficient substitute for the testimony;

(D) *Other forms of evidence, such as oral depositions, written interrogatories, or former testimony would not be sufficient* to meet the needs of the court-martial in the determination of an appropriate sentence; and

(E) The significance of the personal appearance of the witness to the determination of an appropriate sentence, when balanced against the practical difficulties of producing the witness, favors production of the witness. Factors to be considered include the costs of producing the witness, the timing of the request for production of the witness, the

> potential delay in the presentencing proceeding that may be caused by the production of the witness, and the likelihood of significant interference with military operational deployment, mission accomplishment, or essential training.

(Emphasis added in text.)

Nevertheless, appellant rests his right-of-confrontation claim on the Sixth Amendment and the Supreme Court's decision in *Specht v. Patterson*, 386 U.S. 605 (1967). He contends that where sentencing is done in "an adversarial criminal proceeding" (*see generally Middendorf v. Henry*, 425 U.S. 25, 35 (1976)), he is entitled to his full Sixth Amendment rights, including the right to confront and cross-examine the witnesses against him. *See also United States v. Castellanos*, 904 F.2d 1490, 1496 (11th Cir. 1990). He further avers that sentencing at a court-martial is an adversarial criminal proceeding subject to the Sixth Amendment.

I agree with the majority that the Sixth Amendment does not require an adversarial sentencing proceeding with a right of confrontation. *See Williams v. New York*, 337 U.S. 241 (1949). Nevertheless, the President, as authorized by Congress, has provided a limited adversarial sentencing proceeding with a limited right of confrontation in the court-martial system. *See* RCM 1001(e). *See generally Weiss v. United States*, 510 U.S. 163, 176-81 (1994). The purpose of this proceeding is to determine an "appropriate sentence." RCM 1001 (a)(1).

In my view, *Specht v. Patterson*, *supra* at 608, did not address a sentencing hearing of this type. There, after conviction, "a new finding of fact" by the judge was required by Colorado law ("whether a person constitutes a threat of

bodily harm to the public, or is an habitual offender and mentally ill"), which was to serve as the basis for criminal commitment of an accused beyond that authorized for his original conviction. The Supreme Court held that this procedure, in effect, amounted to an additional criminal proceeding under the Colorado Sex Offenders Act. Such a proceeding is clearly not the same as the continuous sentencing procedure at courts-martial, so I conclude that *Specht* is not applicable to appellant's case.

Today, the sentencing procedures at courts-martial have become more akin to those now in the federal court system which do not require Sixth Amendment confrontation. *See United States v. Wise*, 976 F.2d 393, 398 n.2 (8th Cir. 1992). However, as noted in the majority opinion, federal cases clearly recognize a limited Fifth Amendment right to confrontation at these proceedings. *See United States v. Goldfaden*, 959 F.2d 1324, 1330 (5th Cir. 1992). Courts-martial sentencing procedures clearly meet minimum Fifth Amendment due process standards in the sense that they do provide an accused "adequate notice of and an opportunity to rebut or explain information that is used against him." (*E.g.*, RCM 1001(d) (rebuttal and surrebuttal)). *See United States v. Beaulieu*, 893 F.2d 1177, 1181 (10th Cir.), *cert. denied*, 497 U.S. 1038 (1990). In my view, the telephonic portion of appellant's sentence hearing did not deny him adequate due process; even if error did occur, either under the Manual or the Fifth Amendment, it was harmless beyond a reasonable doubt as explained by Judge Effron in his separate opinion.

FOOTNOTE:

[1] This Manual rule is based in part on Article 46, Uniform Code of Military Justice, 10 USC § 846. It states:

> **§ 846. Art. 46. Opportunity to obtain witnesses and other evidence**
> The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence *in accordance with such regulations as the President may prescribe*. Process issued in court-martial cases to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue and shall run to any part of the United States, or the Territories, Commonwealths, and possessions.

(Emphasis added.)

EFFRON, Judge (concurring in the result):

I agree with the majority opinion that the use of telephonic testimony did not violate the Sixth Amendment. I respectfully disagree, however, with the opinion's conclusion that the military judge did not abuse his discretion when he permitted testimony by telephone in this case.

In the present case, the proponent of the testimony -- the prosecution -- offered to take and present the witness' testimony by deposition. The military judge erred by not ordering a deposition as requested. Use of a deposition during sentencing is authorized expressly in RCM 1001(b)(4), Manual for Courts-Martial, United States (2000 ed.), which governs the prosecution's evidence in aggravation in non-capital cases. The Rule allows two forms of evidence other than in-court witness testimony – oral and written depositions. RCM 702 provides detailed rules for the conduct of oral and written depositions. An oral deposition

proceeds in the same manner as testimony at trial, with oral examination and cross-examination by counsel. In a written deposition proceeding, the questions are prepared in advance and are propounded by the deposition officer. In both formats, the parties are represented by counsel, the witness provides verbal answers, and the proceedings are recorded by a reporter or on videotape, audiotape, or sound film. In the present case, for example, the deposition could have been recorded on videotape and replayed during the court-martial. By contrast, there are no procedural safeguards specified for telephonic testimony, and the demeanor of the witness cannot be observed by counsel or the court-martial.

Although the telephone is a well-established means of communication that long predates videotape, the President has not authorized telephonic depositions or testimony in the circumstances of the present case. The majority opinion's reliance on RCM 1001(e)(2)(D) as authority for telephonic testimony is misplaced. That Rule simply provides that the Government is not obligated to produce a live witness through a subpoena or travel orders unless "[o]ther forms of evidence, such as oral depositions, written interrogatories, or former testimony would not be sufficient to meet the needs of the court martial in the determination of an appropriate sentence." The reference in that Rule to three traditional forms of evidence with established roots in the Manual provides no authority for the creation of novel forms of evidence on behalf of the prosecution. Because the President has not authorized telephonic testimony by the prosecution when presenting evidence in aggravation under RCM 1001(b)(4), such testimony is not admissible unless it otherwise would be admissible under the Rules of Evidence.

If the military judge in the present case had granted the prosecution's request to take the testimony of the

sentencing witness by deposition, his action would have comported with the Rules. The military judge, however, decided to take the testimony by telephone. This is not a case in which the military judge was faced with an unprecedented situation involving, for example, a military exigency in which testimony would be lost unless he crafted a creative solution. Although the witness' deployment was imminent, the military judge could have used an authorized procedure, a deposition, that was fully acceptable to the Government -- the party that was the proponent of the witness. The only reasons the military judge gave on the record for rejecting a deposition were based on administrative efficacy: other witnesses would be inconvenienced and the trial would not conclude as swiftly as anticipated if a day were taken for the deposition at another post. In the absence of a compelling necessity for creating a judicial exception to RCM 1001(b)(4), the military judge erred by not ordering a deposition. The question of whether telephonic testimony should be permitted in sentencing proceedings is a matter that should be addressed in the Manual after careful consideration in the rulemaking process, not through judicial decisions at the trial and appellate levels in a case involving administrative convenience.

I agree with the ultimate conclusion reached by the majority opinion, however, because the error was harmless in this case. The defense was allowed to cross-examine the witness and did not develop any significant issues. The accused was tried by a military judge alone and the judge ruled that he would not consider the impact of the witness' deployment as an aggravating factor. In a bench trial, the "prejudicial impact of erroneously admitted evidence is . . . substantially less than it might have been in a jury trial." *United States v. Cacy*, 43 MJ 214, 218 (1995), quoting

*United States v. Cardenas*, 9 F.3d 1139, 1156 (5th Cir. 1993), *cert. denied*, 511 U.S. 1134 (1994).

**APPENDIX B**

**UNITED STATES**

**v.**

**Dennis S. MCDONALD,**
**Hospital Corpsman First Class (E-6), U.S. Navy.**

**NMCM 98 02175.**

**U.S. NAVY-**
**MARINE CORPS COURT OF CRIMINAL APPEALS.**

Sentence Adjudged 18 Feb. 1998.

Decided 31 March 2000.

LT Mari-Rae Sopper, JAGC, USNR, Appellate Defense Counsel.

LCDR Philip Sundel, JAGC, USNR, Appellate Government Counsel.

Before DeCICCO, Chief Judge, TROIDL, Senior Judge, and ANDERSON, Appellate Military Judge.

DeCICCO, Chief Judge:

The appellant was tried by a general court-martial, military judge alone, in Mayport, Florida. He pleaded guilty to sodomy with a child under the age of 16 years and to committing an indecent act with the same child on the same date in violation of Articles 125 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 925 and 934 (1994). Contrary

to his pleas, he was convicted of sodomy by force and without the consent of the victim and of a second indecent act with the same child but on a different date in violation of the same articles. He was found not guilty of taking indecent liberties with several minor females and of attempted rape. The military judge sentenced him to be confined for 15 years, to forfeit all pay and allowances, to be reduced to pay grade E-1, and to be discharged with a dishonorable discharge. The convening authority approved the sentence and, as an act of clemency, suspended all confinement in excess of nine years.

On appeal, the appellant raises four assignments of error. First, he asserts that the military judge abused his discretion by admitting evidence of similar crimes under Military Rules of Evidence [Mil. R. Evid.] 413 and 414 without first applying a Mil. R. Evid. 403 balancing test; second, that the application of Mil. R. Evid. 413 and 414 denied him his right to due process; third, that the military judge committed prejudicial error by denying the appellant his right to confrontation of witnesses under the Sixth Amendment when he allowed the victim's father to testify in aggravation by telephone over defense objection; and fourth, that the sentence is inappropriately severe. Having reviewed the record of trial, the assignments of error, and the Government's response, we have concluded that the findings and sentence are correct in law and fact and that no error materially prejudicial to the appellant's substantial rights was committed. Arts. 59(a) and 66(c), UCMJ.

**The Admission of Mil. R. Evid. 413 and 414 Evidence and Mil. R. Evid. 403 Balancing**

The appellant was charged with the attempted rape of DM, a 15-year-old female friend of his daughters, forcible

sodomy with her, and of committing two indecent acts upon her on separate occasions by lying on top of her and simulating sexual intercourse, and by inserting his finger into her vagina. He was also charged with taking indecent liberties with several minor females by commenting on the size of their breasts. After the prosecution provided notice to the defense of its intent to introduce evidence of similar crimes under Mil. R. Evid. 413 and 414, the appellant moved at trial to prohibit the prosecution from introducing such evidence. Appellate Exhibit VI. He argued that such evidence was unduly prejudicial and violated Constitutional due process.

The proffered evidence consisted of the testimony of JH, the niece of the appellant's former spouse. She would testify that about 15-16 years before the court-martial, when she was about 11 years-old, the appellant placed his hand on her breast on one occasion, and later placed her hand on his penis on another occasion. After reviewing the briefs of counsel and hearing oral argument on the motion, the military judge ruled the proffered evidence to be within the rule of admissibility contained in Mil. R. Evid. 413 and 414, and denied the defense's motion. Record at 77.

At trial, JH testified substantially as summarized above, and the appellant was convicted, contrary to his pleas, of sodomy by force and without the consent of DM and of committing the indecent act of lying on top of DM and simulating sexual intercourse.

Mil. R. Evid. 413 provides, in pertinent part:

> In a court-martial in which the accused is charged with an offense of sexual assault, evidence of the

> accused's commission of one or more offenses of sexual assault is admissible and may be considered for its bearing on any matter to which it is relevant.

Mil. R. Evid. 414 contains a similar provision for the admission of evidence of other crimes in child molestation cases. Federal Rules of Evidence 413 and 414, upon which the Military Rules are based, were passed by Congress to lower the obstacles to propensity evidence concerning sexually related crimes. The purpose was to assist the finder of fact in assessing credibility in sexual assault and child molestation cases, and to assess the accused's criminal propensities in light of his past conduct. *United States v. Enjady,* 134 F.3d 1427, 1431 (10th Cir. 1998), *cert. denied,* 525 U.S. 887 (1998); *United States v. Mound,* 149 F.3d 799, 801 (8th Cir. 1998), *cert. denied,* 525 U.S. 1089 (1999); *United States v. Myers,* 51 M.J. 570, 580 n.19 (N.M.Ct.Crim.App. 1999).

When determining the admissibility of evidence under Mil. R. Evid. 413 or 414, the military judge must apply the balancing test contained in Mil. R. Evid. 403. *Myers,* 51 M.J. at 580 n.20; *United States v. Green,* 50 M.J. 835, 838-39 (Army Ct.Crim.App. 1999).[1] The military judge is afforded wide discretion in applying Mil. R. Evid. 403 and appellate courts ordinarily exercise great restraint in reviewing such decisions. *United States v. Harris,* 46 M.J. 221, 225 (1997). When applying this test, it is preferable for the military judge to articulate the Mil. R. Evid. 403 findings on the record. However, the military judge is not required to do so. *United States v. Acton,* 38 M.J. 330, 334 (C.M.A. 1993); *see also United States v. Braithwaite,* 709 F.2d 1450

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[1] Moreover, this appears to be the intent of the drafters of the rules. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), App. 22, Mil. R. Evid. 413 and 414 analysis at A22-36.

(11th Cir. 1983); *United States v. Potter*, 616 F.2d 384 (9th Cir. 1979). Military judges are presumed to know the law and, absent evidence to the contrary, we will presume that they acted according to it. *United States v. Prevatte*, 40 M.J. 396, 398 (C.M.A. 1994).

The admissibility of JH's testimony was extensively litigated at trial. The briefs of both parties (Appellate Exhibits VI and VII) contained thorough analyses of Mil. R. Evid. 403 balancing. Additionally, the oral arguments of counsel to the military judge also discussed it. Record at 71, 75. From the record before us, we have no doubt that the military judge in this case was aware of the need to apply Mil. R. Evid. 403 balancing and that he did so even though he did not specifically articulate his findings on the record. He was not required to specifically articulate his reasoning on the record and, absent evidence to the contrary, the law affords him the presumption that he correctly applied the law.[2]

The proffered evidence also complied with the five-part test we enunciated in *Myers* for use in determining the admissibility of such evidence. *Myers*, 51 M.J. at 580-81 n. 20. The appellant was charged with offenses that constituted sexual assaults and child molestation. Second, the proffered evidence was evidence of the appellant's commission of sexual assault and child molestation. Third, the evidence was relevant and the factfinder could reasonably conclude that the appellant had committed the prior sexual assault and child molestation. Fourth, the probative value of the

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[2] Nonetheless, military judges should place specific balancing findings on the record so that we can determine how Mil. R. Evid. 403 was applied. Had the briefs and argument of counsel not made clear in this case that the balancing was considered, we would be more inclined to find error. *See Green*, 50 M.J. at 839.

evidence substantially outweighed the prejudicial impact because it illustrated the appellant's propensity to engage in nonconsensual sexual conduct with minor females, particularly in situations when the appellant was in a custodial role with the minor female. And fifth, proper disclosure and notice were provided in a timely manner. Therefore, the proffered evidence was admissible.

Moreover, even if we had concluded that admission of the proffered evidence was erroneous, we would find it harmless beyond a reasonable doubt because of the overwhelming evidence of the appellant's guilt. After the appellant pleaded guilty to committing sodomy without force upon DM and to the commission of an indecent act on DM, the issue of force and lack of consent and the resolution of other charges were before the factfinder. DM's testimony on the issue of force and lack of consent to the sodomy was clear and credible. DM testified she told the appellant to stop, and this testimony was corroborated by the testimony of one of the appellant's daughters who overheard DM's protests. The appellant's other daughter corroborated the circumstances concerning the contested indecent act by confirming that the appellant had locked himself in a room with DM, just as DM had testified, and that the daughter had to force open the door with a screwdriver. The prosecution also presented testimony from other witnesses that the appellant admitted that he had "screwed up big time" and "attacked" and "molested" DM. Record at 228, 233. While the defense presented no evidence on the findings, as was its right, there was nothing presented to impeach, rebut, or cast doubt on DM's testimony on the offenses of which the appellant was convicted either during cross-examination or in the defense case. Therefore, we find no merit in this assignment of error.

**Due Process Violation**

The appellant next argues that the application of Mil. R. Evid. 413 and 414 violates Constitutional due process. However, a review of the pertinent appellate decisions indicates that the courts have uniformly held that such Constitutional concerns with Mil. R. Evid. 413 and 414 are satisfied by the proper application of the Mil. R. Evid. 403 balancing test. *Myers,* 51 M.J. at 280 n.20; *Green,* 50 M.J. at 839 (and cases cited therein).

In this case, we have found that the military judge applied the Mil. R. Evid. 403 balancing test from the circumstances at trial. Therefore, we decline to find a due process violation in the application of Mil. R. Evid. 413 and 414 in this case.

**Telephonic Testimony at the Sentencing Hearing**

Just before the presentation of evidence regarding the contested charges, the trial counsel informed the military judge that the prosecution intended on calling DM's father, a Sergeant Major on active duty in the U.S. Army, to testify during the presentence hearing. Trial counsel informed the court that the witness was at Fort Stewart, Georgia, and was deploying to the Middle East. He was due to report to the terminal that night at midnight for a departure flight at 0600 the next morning. Trial counsel indicated that the prosecution was willing to take the witness's testimony by telephone, but the defense objected to that procedure. In the alternative, the trial counsel requested either a deposition or moving the trial to Fort Stewart to take his testimony that evening.

The defense objected to taking the witness's testimony by telephone based on the Sixth Amendment right to confrontation. The defense also opposed a deposition because of the delay it would cause. The defense was willing to enter into a stipulation of expected testimony to resolve the matter.

Trial counsel responded that Fort Stewart was only an hour and a half away by car, and that as the father of the victim, the witness should be heard to describe the impact the appellant's actions had on DM. The military judge noted that numerous witnesses were standing by to testify, and they would be inconvenienced if hours of travel time were to intervene. Trial counsel persisted in seeking a deposition or moving the trial to Fort Stewart that evening for in-person testimony. The prosecution did not want to stipulate to the testimony of the witness. The military judge took the matter under advisement. Record at 96-102.

The trial on the merits proceeded with opening statements and the testimony of DM. As soon as DM left the witness stand, trial counsel informed the military judge that the Sergeant Major was on the telephone and had confirmed he had to "pull chocks" at 0600 the following morning. The prosecution persisted in its requests for testimony by telephone, and failing that, to move the trial to Fort Stewart. The defense repeated its objection to telephonic testimony and its willingness to stipulate. The military judge stated that the travel time to Fort Stewart was closer to two or two and a half hours. He concluded that it would therefore be impracticable to move the court or send personnel to Fort Stewart for a deposition. He then granted the prosecution's request for testimony by telephone. Record at 167. The prosecution then presented the rest of its case on the

contested charges. The defense rested without presenting evidence, and the military judge announced his findings.

The only evidence presented during the prosecution's case in the sentencing hearing was the telephonic testimony of DM's father. A telephone was placed in the courtroom near a microphone. The witness was sworn, indicated he was alone and that he had no papers in front of him. The questions from counsel and the responses of this witness are recorded verbatim in the record of trial. Record 263-274.

Although it was the prosecution's only sentencing evidence, the testimony of DM's father was very compelling. He testified that he had served in the Army for 26 years and was the Command Sergeant Major for the First Brigade in the Third Infantry Division at Fort Stewart. He was to depart for Kuwait at 0600 the following morning. He then described his relationship with DM, and that one of the hardest things he ever had to do was leave her at the time of this trial and report for his deployment. While crying, he stated that he was a warrior and a soldier and had to go. He said that since the incidents, DM is afraid and more withdrawn, she distrusts men of the appellant's age, her work at school and her sleep had been adversely affected, and she had lost friends. He added that he too had lost sleep over the matter. The defense was provided an opportunity for cross-examination, and it elicited only that DM and the appellant's daughter were still friends.

The appellant argues before us that the military judge erred by allowing the telephonic testimony from the victim's father over defense objection at the presentencing hearing. He continues to assert that his right to confrontation under the Sixth Amendment to the Constitution was violated during the sentencing proceeding. Initially, the Government

conceded error and recommended that we reassess the sentence. Government Answer of 19 Nov 1999 at 8. We then requested further briefing on the following questions:

> DOES THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT APPLY TO NONCAPITAL SENTENCING PROCEEDINGS?
>
> IF NOT, UNDER WHAT LEGAL PRECEDENT OR PRINCIPLE DID THE MILITARY JUDGE ERR IN ALLOWING A PROSECUTION WITNESS TO TESTIFY BY TELEPHONE OVER DEFENSE OBJECTION DURING THE SENTENCING PROCEEDING? *SEE* RULE FOR COURTS-MARTIAL 1001(e).

In a supplemental brief, the appellant acknowledges that Federal case law indicates there is no right to confront witnesses during noncapital sentencing hearings, but asserts that a different result is warranted in light of the military's unique sentencing procedures. The appellant also argues that the recent decision in *United States v. George,* 52 M.J. 259 (2000), supports his position for overturning the appellant's sentence.

The Government changed its position in its supplemental brief, and no longer concedes error. It also argues that *George* does not stand for the proposition that the Confrontation Clause applies to military sentencing hearings and that the appellant reads the holding of the case too broadly.

The Confrontation Clause of the Sixth Amendment "guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." *Coy v. Iowa,*

487 U.S. 1012, 1016 (1988). The basic purpose of the Confrontation Clause is to "ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Maryland v. Craig*, 497 U.S. 836, 845 (1990). The Supreme Court has created a narrow exception to a criminal defendant's right to face-to-face confrontation to further an important public policy and the necessities of the case require the same. *Craig*, 497 U.S. at 850.

In *Williams v. Oklahoma*, 358 U.S. 576 (1959), the Supreme Court discussed the right of confrontation of witnesses in the context where a prosecutor made an unsworn statement to the trial court during a sentencing hearing. The defendant argued on appeal that consideration of the prosecutor's remarks by the trial court denied him his right to confrontation. The Court stated:

> [O]nce the guilt of the accused has been properly established, the sentencing judge, in determining the kind and extent of punishment to be imposed, is not restricted to evidence derived from the examination and cross-examination of witnesses in open court but may, consistently with the Due Process Clause of the Fourteenth Amendment, consider responsible unsworn or "out of court" information relative to the circumstances of the crime and to the convicted person's life and characteristics.

*Williams*, 358 U.S. at 584. The Court then went on to hold that the prosecutor's statement, which was not subject to cross-examination, did not deprive the defendant of fundamental fairness or of any right to confrontation or cross-examination. *Id.*

Several of the Courts of Appeals have held specifically that the Constitutional right to confrontation of witnesses does not apply during non-capital sentencing proceedings. *United States v. Morrow,* 177 F.3d 272, 304 (5th Cir. 1999); *United States v. Wise,* 976 F.2d 393, 398-404 (8th Cir. 1992)(en banc); *United States v. Silverman,* 976 F.2d 1502, 1512 (6th Cir. 1992)(en banc); *United States v. Helton,* 975 F.2d 430, 434 (7th Cir. 1992); *United States v. Goldfaden,* 959 F.2d 1324, 1330 (5th Cir. 1992); *United States v. Beaulieu,* 893 F.2d 1177, 1181 (10th Cir. 1990).[3]

The rationale of such holdings is that once the guilt of the accused has been determined, courts have afforded sentencing judges wide discretion in the sources and types of evidence used to determine the kind and extent of punishment. As long as the evidence produced during the sentencing proceeding has sufficient indicia of reliability and is substantially significant for the sentencing authority to consider in fashioning an appropriate sentence, it may be introduced.

As a general proposition, the Confrontation Clause applies in trials by court-martial. *United States v. Gleason,* 43 M.J. 69, 73 (1995); *United States v. Stombaugh,* 40 M.J. 208, 212 (C.M.A. 1994); *United States v. Jacoby,* 11 C.M.A. 428, 29 C.M.R. 244 (1960). However, we have found no military decisions discussing whether the Confrontation Clause extends to military presentencing proceedings, or whether testimony can be taken over the telephone during such proceedings over defense objection.[4]

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[3] *See also United States v. Beeson,* 1999 U.S.App. Lexis 2799 (9th Cir. 1999); *United States v. Pewenofkit,* 1999 U.S.App. Lexis 5766 (10th Cir. 1999); and *United States v. Garavaglia,* 1999 U.S.App. Lexis 6390 (6th Cir. 1999).

[4] In *United States v. Morrison,* 13 M.J. 649 (N.M.C.M.R. 1982), this

Based on the extensive Federal precedent cited above, we are convinced that the Confrontation Clause does not apply to post-conviction, non-capital, presentence proceedings, and that it does not prohibit telephonic testimony during such proceedings. We must then look to the Uniform Code of Military Justice, the Military Rules of Evidence and the Rules for Courts-Martial for guidance. While the Code and the Military Rules of Evidence do not address the issue, Rule for Courts-Martial 1001(e)(1) provides: "During the presentence proceedings, there shall be much greater latitude than on the merits to receive information by means other than testimony presented through the personal appearance of witnesses." R.C.M. 1001(e)(1) affords the military judge the discretion to determine whether the presence of witnesses is required in presentence proceedings. By doing so, it parallels the practice in the other Federal courts by allowing different forms of evidence on sentencing, other than the personal appearance of witnesses.

In the case before us, the prosecution's witness in aggravation testified by telephone. He was properly identified and placed under oath. He had relevant testimony to offer,[5] and he was subject to cross-examination. He verified that he was alone in the room and had no papers in front of him. The circumstances of his imminent deployment abroad were fully described for the record.[6] The sole basis for the defense objection to this method of

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court held that a military judge did not err by taking telephonic testimony on an interlocutory matter during an Article 39(a) session.

[5] R.C.M. 1001(b)(4) allows for the introduction of evidence concerning the impact of the offense on the victim.

[6] DM's father had actually been present at the start of the trial on 16 February 1998 when he was recalled to his duty station after his unit was alerted of its imminent deployment. Record at 266.

testimony was an alleged denial of the right to confrontation because the witness was not physically present in the courtroom where his demeanor could be observed.

We hold that the military judge in this case did not abuse his discretion under R.C.M. 1001(e)(1) in overruling the defense objection to the telephonic testimony of the victim's father where: (i) the testimony was used during the sentencing proceeding; (ii) it had sufficient indicia of reliability; (iii) it provided relevant information (in this case, victim and witness impact information), and (iv) the use of the telephone was necessary due to the witness' imminent deployment abroad the following day. We have found no authority to the contrary and nothing in the Constitution, UCMJ, or Manual for Courts-Martial that military personnel enjoy greater rights to confrontation of witnesses than do civilians. Our holding does not extend to testimony taken during the findings portion of the court-martial, or to situations where telephonic testimony is utilized over defense objection in sentencing solely as a matter of convenience, cost effectiveness, or other less compelling reasons.[7]

As a final point, we distinguish our recent holding in *United States v. Shabazz*, 52 M.J. 585 (N.M.Ct.Crim.App. 1999), where a prosecution witness testified on the merits of the case by video teleconferencing and was prompted while answering questions on cross-examination. In the case at bar, the testimony of DM's father was taken during the sentencing proceeding and there were sufficient guarantees to ensure he testified on his own.

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[7] We also find no merit in the appellant's argument that the holding in *George*, *supra*, controls this issue.

**Sentence Appropriateness**

Undoubtedly, the appellant's sentence to a dishonorable discharge and confinement for 15 years (with confinement in excess of nine years suspended) was severe. However, his crimes were likewise severe and deserving of harsh punishment.[8] He was convicted of committing sodomy by force upon a 15-year-old girl who was spending the night at his home with his daughters. He was also convicted of two separate indecent acts upon her. We have carefully considered the entire record, including the appellant's military record, the fact that he pleaded guilty to some of the offenses and his expressed remorse, but nonetheless find the sentence, as approved by the convening authority, not to be inappropriately severe.

**Disposition**

Accordingly, the findings and sentence, as approved on review below, are affirmed.

Senior Judge TROIDL and Judge ANDERSON concur.

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[8] The maximum punishment for forcible sodomy included confinement for life. MANUAL FOR COURTS-MARTIAL, UNITED STATES (1995 ed.), Part IV, ¶ 51e(1).